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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

In re ISABELLA S., a Person Coming  
Under the Juvenile Court Law.

Contra Costa County Children & Family  
Services Bureau,

Plaintiff and Respondent,

v.

C.S.,

Defendant and Appellant.

A154589

(Contra Costa County  
Super. Ct. No. CR JU3910)

Mother C.S. (Mother) appeals from the juvenile court's orders denying her petition under Welfare and Institutions Code section 388 and terminating her parental rights to her daughter, Isabella S., pursuant to Welfare and Institutions Code section 366.26.<sup>1</sup> Isabella S.'s father is not a party to this appeal. Mother's only contention is that the court and welfare departments failed to make an adequate inquiry into whether the Indian Child Welfare Act (ICWA) applies to Isabella S. We conclude that the court erred in failing to inquire into the potential Indian heritage of Isabella S.'s father; and, because Mother has made an offer of proof regarding her Indian heritage on appeal, limited remand is necessary to allow the court and respondent to make proper inquiry and comply with the notice provisions of ICWA if necessary.

<sup>1</sup> All undesignated section references are to the Welfare and Institutions Code.

## **BACKGROUND**

### **I. Colusa County Proceedings**

The Colusa County Department of Health and Human Services (Department) filed a petition under section 300, subdivision (b) regarding newborn Isabella S., alleging that Mother had a history of untreated drug and alcohol addiction, used methamphetamine and alcohol in the early stages of her pregnancy, and craved methamphetamine and continued to drink alcohol after Isabella S. was born. The petition also alleged that Mother was unable to follow instruction from hospital staff and was unable to demonstrate her ability to safely and properly care for the medically fragile infant.<sup>2</sup> The Department's detention report stated that ICWA does or may apply. Isabella S. was detained, and the court found that ICWA does or may apply, consistent with the detention report. The court ordered Mother, who was present, to complete the ICWA-020 form (Parental Notification of Indian Status).

The Department's jurisdiction report, dated March 20, 2017, stated that ICWA does or may apply. At the contested jurisdictional hearing on April 17, 2017, Mother appeared and submitted on this report. The court adopted the Department's recommendations and sustained the petition's counts. The court also found that the alleged father, A.K., was not the biological father pursuant to DNA results and dismissed him. Mother then informed the court that G.L. (Father) was the likely father, and a social worker reported to the court that Father had called and left a phone number but had not returned her calls. The court ordered genetic testing for Father and scheduled a disposition hearing for May 2017.

The Department filed its disposition report on May 11, 2017, stating without further elaboration that ICWA does not apply. By this time, Mother had not visited Isabella S. since early March, she had not kept appointments with the social worker, and she had not engaged in any services. Mother had been evicted from her apartment and

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<sup>2</sup> Because the sole issue in this appeal relates to the adequacy of the ICWA inquiry, we only briefly summarize the proceedings leading to termination of parental rights.

moved in with an acquaintance, and she admitted to continued alcohol, marijuana, and methamphetamine use. Father's half-brother and sister-in-law informed a social worker that Father was homeless and struggled with alcohol and drug addiction. The Department recommended that Isabella S. be adjudged a dependent child of the court pursuant to section 300, subdivision (b) and that Mother and Father be offered reunification services.

Father first appeared at the May 2017 disposition hearing, at which time the court declared him to be the biological father and continued the hearing to June 5, 2017. The court continued the hearing again to June 19, 2017. Mother and Father were present at each of these hearings, but the court did not question them about their potential Indian ancestry.

On June 19, 2017, the court declared Father to be Isabella S.'s presumed father. Based on the Department's disposition report, the court ordered that Mother and Father receive family-reunification services and found that ICWA does not apply. Mother submitted on the disposition report. The case was then transferred to Contra Costa County, where Father lived.

## **II. Contra Costa County Proceedings**

At the transfer-in hearing in Contra Costa County, Father appeared but Mother did not, and the court set a hearing to appoint Mother's counsel. Neither Father nor Mother appeared at the appointment of counsel hearing, at a later status hearing, or at the six-month review hearing.

By the time of the six-month review hearing, Mother and Father had not communicated with respondent regarding their court-ordered services, and they had not visited Isabella S. because they had not presented themselves to the court, as they were required to do before seeing the child. Father had relapsed on methamphetamine and alcohol, and he had been involuntarily committed pursuant to section 5150. He was found to be receiving food stamps in Brentwood, but he had not contacted respondent as requested. Mother left California and had moved to Idaho, and she admitted to continued use of methamphetamine there.

Respondent's six-month status review report originally stated that ICWA did or may apply, but the report was amended to state that the court found that ICWA did not apply at the June 19, 2017 disposition hearing. At the review hearing, the court adopted respondent's recommendations as amended, terminated family reunification services for Mother and Father, and set a hearing under section 366.26.

Shortly before the scheduled section 366.26 hearing, Mother filed a section 388 petition requesting visits and reinstatement of reunification services, and the court held an evidentiary hearing. Mother appeared and testified that she had moved back from Idaho and was living in a sober-living environment in California. She had started substance-abuse treatment, was being drug tested, and had begun attending Alcoholics Anonymous and Narcotics Anonymous meetings, a parenting class, groups, and individual counseling. She testified that she moved to Idaho to "get clean," and denied telling a social worker that she had continued use of methamphetamine and alcohol while in Idaho. Mother conceded that she had not been involved in Isabella S.'s medical care and had not completed a psychological evaluation as required by her case plan. The court denied Mother's section 388 petition, finding she showed "changing," but not "changed" circumstances, and her requests were not in Isabella S.'s best interests.

Mother next appeared at the section 366.26 hearing; Father did not appear, and his whereabouts were unknown. Respondent's section 366.26 report stated that Mother had visited Isabella S. only three times since she was released from the hospital, and Father had not visited the child at all since she was detained. The court adopted respondent's recommendations, terminated the parental rights of Mother and Father, and ordered a permanent plan of adoption for Isabella S. by Father's half-brother and sister-in-law, who had become Isabella S.'s caretakers. Respondent's section 366.26 report stated that ICWA did not apply because on, June 19, 2017, the court found that Isabella S. was not an Indian child. Mother appealed the court's orders denying her section 388 petition and terminating her parental rights.

## DISCUSSION

The sole issue in this appeal is whether respondent and the court failed to adequately inquire into the possible Indian heritage of Isabella S. under ICWA. Mother argues that the court did not obtain the required ICWA-020 form from Father, and both respondent and the court failed to satisfy their continuing duty to inquire whether Isabella S. is or may be an Indian child. Mother also provides an offer of proof for the first time on appeal stating that she has Blackfoot and/or Cherokee ancestry through her great, great grandmother. Reluctantly, despite the delay that will be caused in final resolution of this case, we cannot say, on the record before us, that the ICWA inquiry below was adequate nor that any resulting error was harmless.

“Congress enacted ICWA in 1978 in response to ‘rising concern in the mid-1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.’ ” (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7–8.) “[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .” (25 U.S.C. § 1902.)

ICWA requires notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights “where the court knows or has reason to know that an Indian child is involved.” (25 U.S.C. § 1912(a).) If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary of the Interior. (*Ibid.*; 25 U.S.C. § 1903(11).) These notice requirements serve two purposes. First, they facilitate a determination of whether the child is an Indian child. (25 U.S.C. § 1903(4) [defining an Indian child to be “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a

member of an Indian tribe”].) The Indian tribe makes this final determination. (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1386–1387.)

Second, ICWA notice ensures that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child. (See 25 U.S.C. § 1911(c) [an Indian child’s tribe has the right to intervene in any state court proceeding for the foster care placement of, or termination of parental rights, to that child]; 25 U.S.C. § 1911(a) [an Indian tribe has exclusive jurisdiction over child custody proceedings involving Indian children who reside or are domiciled within the reservation of such tribe, except where federal law vests jurisdiction in a state]; 25 U.S.C. § 1912(a) [no foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe].) In enacting these provisions, “Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.” (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 49.)

Consequently, when any of ICWA’s notice or inquiry provisions are violated, an Indian child, parent, Indian custodian, or the Indian child’s tribe may petition the court to invalidate the proceeding. (25 U.S.C. § 1914; § 224, subd. (e); *In re Marinna J.* (2001) 90 Cal.App.4th 731, 735.) And, because ICWA’s notice provisions serve the interests of Indian tribes, “ ‘irrespective of the position of the parents,’ ” they cannot be waived by the parent. (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1195.) Thus, “the generally accepted rule in dependency cases is that the forfeiture doctrine does not bar consideration of ICWA notice issues on appeal.” (*Ibid.*; see also *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1385.)

ICWA requires notice when a court “ ‘ “knows or has reason to know that an Indian child is involved,” ’ ” but federal law allows states to impose stricter standards, and California has done so. (*In re Noreen G.*, *supra*, 181 Cal.App.4th at p. 1386.) The court and county welfare departments have “an affirmative and continuing duty to

inquire” (former § 224.3<sup>3</sup>, subd. (a)) whether a child involved in a dependency proceeding “may be an Indian child” (Cal. Rules of Court, rule 5.481(a).) In addition, “[a]t the first appearance by a parent,” the court is required to order the parent to complete ICWA-020, pursuant to which the parent must disclose whether the child has Indian ancestry, is a member of an Indian tribe, or could be eligible for membership. (Cal. Rules of Court, rule 5.481(a)(2), (3).) If the court provides the form and asks the parent if the child may have Indian ancestry and the parent fails to respond, the initial duty of inquiry is discharged; the duty to make further inquiry is triggered when the court receives subsequent information suggesting that the child may be an Indian child. (Former § 224.3, subds. (b)–(d); Cal. Rules of Court, rule 5.481(a)(4).)

Mother’s interpretation of the court’s continuing duty to inquire regarding Mother’s potential Indian ancestry is overbroad. The petition stated that the Department had not yet inquired into Isabella S.’s potential Indian heritage, and, at the detention hearing, the court ordered Mother to complete ICWA-020. She did not return the form, but the court fulfilled its initial duty of inquiry by ordering her to do so, and Mother did not present any subsequent information below suggesting that Isabella S. may be an Indian child. (See Cal. Rules of Court, rule 5.481(a)(2); *In re C.Y.* (2012) 208 Cal.App.4th 34, 42 [where court and welfare department asked regarding the minor’s Indian ancestry and the mother was ordered to fill out the Indian ancestry questionnaire but did not, no further duty of inquiry was required].)

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<sup>3</sup> Several statutes concerning inquiry into a child’s possible Indian heritage, including former section 224.3, were amended by Assembly Bill No. 3176 (2017–2018 Reg. Sess.), effective January 1, 2019. We therefore refer to the statutory provision operative at the relevant time as the “former” statute. Section 224.2, formerly section 224.3, now provides more comprehensive rules defining the scope of inquiry required under ICWA. (See, § 224.2, subds. (a) [affirmative and continuing duties to inquire begin with initial contact and include asking the party reporting child abuse or neglect whether he or she has any information that the child may be an Indian child] & (c) [at each party’s first court appearance, the court shall ask each hearing participant whether the participant knows or has reason to know that the child is an Indian child, and it shall instruct the parties to report any subsequent information providing reason to know that the child is an Indian child].)

A different conclusion must be reached with respect to Father. Father first appeared at the May 2017 disposition hearing, and then again on June 5, 2017, and June 19, 2017. The court did not order Father to complete the ICWA-020 form at these hearings or orally inquire about his potential Indian ancestry. In fact, ICWA was not mentioned during any of these hearings. The court thus did not satisfy its initial duty of inquiry under ICWA with respect to Father.

Citing *In re E.H.* (2006) 141 Cal.App.4th 1330 and *In re S.B.* (2005) 130 Cal.App.4th 1148, respondent urges us to infer that the Department, and by extension respondent, properly initially inquired regarding Isabella S.'s Indian heritage. In *In re E.H.*, sufficient evidence established that the welfare department fulfilled its duty of inquiry based, in part, on inferences derived from its reports. (*In re E.H.*, at pp. 1334–1335.) The initial detention report there stated that ICWA might apply, the court ordered the mother to disclose any potential Indian heritage at the first detention hearing, and the amended detention report and all subsequent reports stated that ICWA did not apply. The mother submitted to the reports that stated ICWA did not apply, and the court exhorted both parents at each hearing to disclose their possible Indian ancestry. (*Ibid.*) Under these circumstances, sufficient evidence established that both the court and the welfare department fulfilled their duties of inquiry. (*Ibid.*; see also *In re S.B.*, at pp. 1160–1162 [where the initial petition did not check boxes indicating that ICWA may apply and the mother submitted on multiple subsequent reports stating that it did not, sufficient evidence supported the inference that the welfare department inquired regarding the minor's Indian ancestry].)

In this case, the record does not provide for as strong an inference that the Department satisfied its initial duty of inquiry as those drawn in *In re E.H.*, and *In re S.B.* Although the May 2017 disposition report stated that ICWA did not apply, the March 2017 jurisdictional report stated that ICWA did or may apply, and Mother submitted to both of these conflicting statements. Unlike in *In re E.H.*, aside from ordering Mother to complete ICWA-020, the court did not affirmatively inquire regarding either parent's ancestry. Further, the court did not declare Father to be the biological or presumed father

until May 15, 2017, and June 19, 2017, respectively. A social worker contacted Father's sister-in-law on May 10, 2017 to give Father paternity-test results, but the timing of this call and the disposition report filed one day later casts some doubt on whether the social worker inquired regarding Father's potential Indian heritage before the court pronounced him to be the biological father. The reports themselves do not document any ICWA conversations with either parent and shed no further light on this matter.

Nonetheless, we need not decide whether the record supports the inference that the Department satisfied its initial duty of inquiry because Mother now submits information suggesting that Isabella S. has Indian ancestry. Under Code of Civil Procedure, section 909, Mother asks this court to take evidence on appeal consisting of a signed ICWA-020 form wherein she declares that one or more of her parents, grandparents, or other lineal ancestors is or was a member of the Cherokee and/or Blackfoot tribes. Her counsel also submitted a declaration stating that Mother told him that her Indian heritage descends from her great, great grandmother, and counsel's declaration also provided the name of Mother's great, great grandmother. While we will not grant Mother's motion to take additional evidence, this offer of proof is sufficient to convince us to make a limited remand.

“ ‘Although appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 . . . the authority should be exercised sparingly. ’ ” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) “ ‘Absent exceptional circumstances, no such findings should be made.’ ” (*Id.* at p. 408, fn. 5.) Code of Civil Procedure section 909 does “ ‘not affect the respective provinces of the trial and reviewing courts, nor change the established rule against appellate weighing of evidence. The power to invoke the statute should be exercised sparingly, ordinarily only in order to affirm the lower court decision and terminate the litigation, and in very rare cases where the record or new evidence compels a reversal with directions to enter judgment for the appellant’ ” (*In re Noreen G.*, *supra*, 181 Cal.App.4th at pp. 1388–1389.) No exceptional circumstances are presented here to justify making Mother's submission part of the record; it is for the trial court, not this court, to make appropriate inquiry. (See *id.* at pp. 1388–1390.)

Although we deny Mother's motion to take additional evidence on appeal, her offer of proof suggests that her great, great grandmother was of Cherokee and/or Blackfoot heritage. One of ICWA's goals is to protect the interests of Indian tribes, which have a federally-declared right to be informed of dependency proceedings concerning children who are members or who are eligible to become members of the tribe (25 U.S.C. § 1901 *et seq.*; *In re Holly B.* (2009) 172 Cal.App.4th 1261, 1266), and the information before us suggests that Isabella S. may be an Indian child within the meaning of ICWA. (See *In re Kadence P.*, *supra*, 241 Cal.App.4th at pp. 1386–1387 [where information suggested that a minor may have Creek or Seminole ancestry through her great, great, great grandparent and the record did not reflect the membership rules for such tribes, ICWA required notice to the tribes because the minor could be an Indian child].) ICWA inquiry error may be deemed harmless where nothing suggests that a minor may be an Indian child, but where such information exists, limited remand is warranted. (*In re Noreen G.*, *supra*, 181 Cal.App.4th at pp. 1388–1389.)

With respect to Father, respondent urges us to discount any inquiry error as harmless. Mother has not made a showing suggesting that Father has Indian heritage. However, the record does not establish that Mother and Father had a long-term relationship, and it shows that they are estranged. Unlike in cases finding harmless error where the appellant does not show that he or she has Indian heritage (*In re N.E.* (2008) 160 Cal.App.4th 766; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426), we cannot presume that Mother has knowledge of Father's heritage such that she could make an offer of proof. Where the court failed to comply with its obligation to require Father to fill out ICWA-020 and did not question him at all regarding his potential Indian ancestry, we are not convinced that the error is harmless. (*In re J.N.* (2006) 138 Cal.App.4th 450, 461.) Limited remand to inquire into Father's potential Indian heritage is additionally

appropriate because we have already determined that inquiry to Mother is appropriate on remand.<sup>4</sup>

In sum, while it does not appear that there was a total failure to inquire with respect to Mother's potential Indian heritage, the court did fail to inquire with respect to Father, and Mother's offer of proof is sufficient to persuade us that it is appropriate to remand the matter for the limited purpose of obtaining further information from Mother and Father, and to give notice to the pertinent tribe or tribes if necessary. (*In re Noreen G.*, *supra*, 181 Cal.App.4th at pp. 1388–1389.) It is difficult to see how such delay will benefit Isabella S., but, given Mother's assertion of Indian heritage on appeal and the court's lack of inquiry to Father, we are compelled to grant a limited remand.

### **DISPOSITION**

We deny Mother's motion to take additional evidence on appeal. We decline to reverse the order that terminated parental rights or the order denying Mother's section 388 petition. Instead, we order a limited remand with directions to the court to effectuate proper inquiry and notice under ICWA and California law implementing ICWA, including under current sections 224.2 and 224.3, and California Rules of Court, rule 5.481. If, after proper inquiry and notice, a tribe determines that Isabella S. is an Indian child, the parents may petition the court to invalidate the termination of parental rights upon a showing that such action violated the provisions of ICWA. If Isabella S. is not found to be an Indian child, the court's sections 388 and 366.26 orders are affirmed.

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<sup>4</sup> In the event that reasonable efforts are unsuccessful in locating Father, the record indicates that one of Isabella S.'s caretakers is Father's half-brother. Inquiry may be made to this relative if the court deems it appropriate.

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BROWN, J.

WE CONCUR:

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STREETER, ACTING P. J.

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TUCHER, J.

A154589/*In re Isabella S.*